

January 12, 2007

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: Samuel D. Johnson

Date of Filing: March 7, 2006
April 12, 2006

Case Number: TFA-0152
TFA-0160

On March 7, 2006, Samuel D. Johnson (Johnson) filed an Appeal from a determination issued to him by the FOIA/Privacy Act Group (HQ) of the Department of Energy (DOE) on February 3, 2006, in response to a request for documents that Johnson submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. Johnson also filed an Appeal on April 12, 2006, that was combined with the previous appeal for administrative efficiency. These Appeals, if granted, would require that HQ perform an additional search for responsive material.

I. Background

Johnson made two FOIA requests to DOE/HQ, one in 2002 and one in 2005. On September 24, 2002, Johnson requested a copy of all items in his DOE personnel file. Letter from Johnson to Abel Lopez, HQ (September 24, 2002). HQ assigned the request number F2002-00490 and forwarded the request to the Office of Counterintelligence (CN) and the Office of Personnel Security (HS). HQ sent Johnson a partial response on November 28, 2003 that contained 57 documents from his file and on April 21, 2005, DOE sent Johnson a final determination letter. Along with the letter, HQ released two documents from CN, one unredacted document and one redacted document. The redacted document, a memorandum discussing a summary of information derived from a polygraph Johnson took in 2001, contained deletions pursuant to Exemption 7 of the FOIA. On June 24, 2005, Johnson appealed the April 2005 determination. OHA contacted HQ to determine if any other responsive documents could be located. HS located additional responsive material and sent that information to Johnson on August 24, 2005. HQ responded that they had provided additional documents related to Johnson's original request and that additional information could be forthcoming. In November 2005, OHA directed CN to release any additional responsive material to Johnson or issue a new determination justifying the withholding of any responsive material. *See Samuel D. Johnson*, 29 DOE ¶ 80,231 (2005) (OHA Case No. TFA-0107).

A. TFA-0152

Johnson made an additional request to HQ in May 17, 2005 for ten items and HQ forwarded that request, assigned number F2005-00275, to CN and HS. On February 3, 2006, HQ sent Johnson a determination letter. Letter from DOE to Johnson (February 3, 2006) (Determination). Of the ten items, HQ stated that six do not exist. As regards the other four items, Item 1 (a copy of a letter postponing an administrative review hearing) had been released previously to Johnson, and Item 2 (correspondence regarding an alleged interview held on January 17, 2003) was released in its entirety in the determination. HQ also stated that the two remaining items responsive to the initial request had been sent to CN and, in addition, if any further responsive material was found in the files of HS, it would be reviewed and released if not exempt. Letter from Abel Lopez, HQ to Johnson (February 3, 2006). Johnson found the response to be unacceptable and filed this Appeal on March 7, 2006. OHA assigned case number TFA-0152 to the Appeal.

A. TFA-0160

In response to F2002-00490 and F2005-00275, CN released several items to Johnson in 2006. On March 2, 2006, CN sent Johnson a letter regarding his first appeal, OHA Case No. TFA-0107. In that letter, CN released a document entitled “Summary of Polygraph Derived Information” to Johnson in its entirety. CN had previously withheld one portion of the document under FOIA Exemption 7(E), but then reconsidered the deletion and decided to release the document in its entirety. On March 14, 2006, CN sent Johnson a letter regarding polygraph material he had requested.¹ First, CN decided to withhold the video and audio tape record of the polygraph examination under FOIA Exemptions 7(A) and 7(E).² “[Exemption] 7(E) permits the withholding of records of information compiled for law enforcement purposes, the production of which would disclose investigative techniques and procedures for law enforcement investigations or prosecutions would disclose guidelines for law enforcement prosecution if such disclosure could reasonably be expected to risk circumvention of the law.” Letter from CN to Johnson (March 14, 2006). CN stated that the Department of Defense Polygraph Institute, which oversees federal polygraphs, has ruled that any existing audio or videotapes of polygraph examinations constitute law enforcement records and qualify for exemptions 7(A) and 7(E). *Id.* Second, CN informed Johnson that there is no transcript of the statement made by the Polygraph Examiner. The video and audio tape record of the polygraph has never been transcribed and the FOIA does not compel an agency to create a record in order to satisfy a FOIA request. Third, the Polygraph Program, CN and DOE do not prepare independent determinations that assess the integrity and honesty of any polygraph examinee. Finally,

¹ Johnson had requested: (1) a copy of the video or audio recording or a transcript of the discussion between Johnson and the polygraph examiner in September 2001; and (2) a written statement from the examiner about his impressions and evaluations of Johnson’s integrity and truthfulness.

² Exemption 7(A) applies to a pending law enforcement proceeding. Since we have no evidence that there is an ongoing investigation, we will not address Exemption 7(A).

CN stated that it does not maintain any related documents regarding Johnson's case that have been changed since his original request for information in September 24, 2002. On March 28, 2006,

Johnson sent CN a letter asking them to reconsider their findings. CN forwarded that letter to OHA, which accepted the letter as a FOIA appeal on April 12, 2006, and assigned it OHA Case No. TFA-0160.

Johnson submitted substantial information with each of his letters, and maintained that the appeals should be consolidated since he has made only one true request, that of September 24, 2002. However, due to the large volume of material that he submitted, it was not clear what material Johnson requested. In his letters, Johnson asked for a variety of information, much of it redundant. We will examine both appeals together in the interest of administrative efficiency and to minimize confusion regarding this case. After extensive review of the many letters and documents that he submitted, we asked Johnson to clarify the relief that he seeks on Appeal. In response, Johnson stated that he sought the following items: (1) an excerpt from the actual polygraph report regarding Johnson's veracity that Johnson alleges should be on file in CN's Record System; (2) a report provided to SO-2 (now HS) reporting the results of an interview with Brigadier General Haeckel in January 2002; (3) documentation of the approval of the OHA Director to extend the hearing date for his personnel security review beyond the 90 day regulatory limit; (4) documentation disclosing the name of the individual who authorized sending a copy of some contents of his file to OPM between October 2001 and January 2002; and (5) a statement that CN has improperly delayed the processing of his appeals. Electronic mail message from Johnson to Valerie Vance Adeyeye, OHA (June 7, 2006).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

A. Polygraph Report

Johnson was the subject of a polygraph examination in September 2001. According to Johnson, the polygraph examiner called Johnson "the most honest person" that the examiner had ever examined and "he also volunteered the statement that it is virtually impossible for [Johnson] to lie." Electronic mail message from Johnson to Valerie Vance Adeyeye, OHA (June 7, 2006). Johnson also alleges

that the polygraph examiner stated that he was going to make an entry in the official report about the polygraph. Johnson insists that this statement exists in DOE Record System 15. He requests a copy of the portion of the actual polygraph record that contains these statements or, in the alternative, a brief statement from the polygraph examiner that he did in fact say those things.

CN responded to Johnson that polygraph reports are exempt under FOIA Exemptions 7(A) and (E) as law enforcement records. We agree with CN that the video of the examination was properly withheld under Exemption 7(E). Courts have endorsed withholding polygraph examinations on the basis that disclosure of their details could reduce or nullify their effectiveness. *See Hale v. Department of Justice*, 973 F.2d 894, 902-03 (10th Cir. 1992) (concluding that disclosure of “polygraph matters” could lessen effectiveness); *Piper v. Department of Justice*, 294 F. Supp. 2d 16, 30 (D.D.C. 2003) (declaring that polygraph materials were properly withheld); *Shores v. FBI*, 185 F. Supp. 2d 77, 84 (D.D.C. 2002); *Coleman v. FBI*, 13 F. Supp. 2d 75, 83 (D.D.C. 1998) (holding that disclosure of details of polygraph examination would frustrate enforcement of law).³ As regards a statement by the examiner, no such document exists in DOE’s records, and the FOIA does not require an agency to create a document that does not exist.

B. Alleged Interview

Johnson also requested the record of an alleged interview conducted with Brigadier General Ronald Haeckel on or about January 2002. According to Johnson, two employees of HS interviewed Brigadier General Haeckel regarding Johnson in January 2002. Johnson contends that a report should have been created by the interviewers, and he requests a copy of the alleged report. In the alternative, if there is no report, he wants a statement from the interviewers that they did not make one, and what they would have put in a report, if they had made one. Electronic mail message from Johnson to Valerie Vance Adeyeye, OHA (June 8, 2006). He argues that there must be a report of that interview because DOE regulations require that interviewers submit a report summarizing the interview and that the report be placed in the individual’s personnel file in DOE Record System 43.

We contacted Dave McVicker, one of the individuals alleged to have interviewed Brigadier General Haeckel. McVicker stated that there was no formal interview; rather, he had a ten minute “off the record” discussion with Haeckel in January 2002 during a routine background investigation.⁴ Memorandum of Telephone Conversation between Dave McVicker and Valerie Vance Adeyeye,

³ Nonetheless, at our request CN agreed to review the polygraph video for the information that Johnson described. The manager of the Polygraph Center performed the review and located the only remarks that could be construed as responsive. She concluded that the statements made by the polygraph examiner were actually an interrogation technique used to keep an individual talking while the individual discloses relevant data to the examiner. Electronic Mail Message from CN to Valerie Vance Adeyeye (August 2, 2006). As stated above, Exemption 7(E) protects this type of technique from disclosure to the public under the FOIA. *See Hale*, 973 F.2d at 902-903.

⁴ The interview was conducted “off the record” at Haeckel’s request. Memorandum of Telephone Conversation between Dave McVicker and Valerie Vance Adeyeye, OHA (December 21, 2006).

OHA (December 21, 2006). According to McVicker, there was no formal interview and therefore no report. Further, the FOIA does not require an agency to create a new document in response to a FOIA request. Regardless of Johnson's interpretation of the regulation that a responsive document was or should have been created in this situation, no such document exists.

C. Extension of Hearing Date

Johnson also requests a copy of documentation of the approval of the Director of OHA to extend the date of an administrative hearing under 10 C.F.R. Part 710.⁵ In the alternative, Johnson requests a statement from the Director of OHA that he approved the extension. At our request, the Hearing Officer provided a copy of his electronic mail notification to the Director requesting an extension of the date for that hearing. We asked him to search for any record of the Director's response to this request. The Hearing Officer searched and found no such document. Electronic Mail Message from Fred Brown, OHA, to Valerie Vance Adeyeye, OHA (June 12, 2006). Thus, even though the Hearing Officer requested an extension from the Director, as the regulations require, there is no record that the Director either approved or disapproved the request. As stated previously, the FOIA does not require the agency to create a new document in response to Johnson's request for a statement from the OHA Director.

D. Transmittal to OPM

Johnson also requested a copy of the documentation that authorized the alleged transmittal of some of the contents of his personnel file to OPM. According to Johnson, he has "a letter from OPM informing [him] that this was done, so it is undeniable that it happened. This OPM letter also strongly implies that doing so was a violation of the FOI/PA" Electronic mail message from Johnson to Valerie Vance Adeyeye, OHA (June 8, 2006).

We examined the documentation surrounding this issue and conclude that Johnson has misinterpreted what occurred. DOE forwarded Johnson's FOIA request to OPM on January 14, 2003, advising OPM that DOE had located two OPM investigations relating to Johnson in DOE files. Letter from Office of Security, DOE to OPM (January 14, 2003). As is standard procedure in response to a FOIA request, the originating agency must review the documents and determine if the responsive material can be released. As regards the investigations, OPM was the originating agency. DOE did not send those documents to OPM, but rather gave OPM the investigation case numbers so that OPM could easily locate and review the files. Since no material was transmitted to OPM, there is no material responsive to the request for documentation of a transmittal.

E. CN Statement

On March 2, 2006, CN responded to Johnson regarding his appeal of OHA Case No. TFA-0107 and sent him some responsive material. On March 14, 2006, CN sent Johnson a final response. CN

⁵ 10 C.F.R. § 710.25 (g) requires the approval of the OHA Director for an extension of a hearing date.

directed Johnson to challenge a denial by writing directly to OHA, but Johnson instead replied to CN on March 28, 2006. On April 6, 2006, CN forwarded Johnson's response to OHA for review, stating that Johnson's letter "appears to be an appeal." Letter from CN to Director, OHA (April 6, 2006). Johnson requests a statement from OHA that CN's statement was improper and delays HQ's effort to comply with Johnson's request. Electronic mail message from Johnson to Valerie Vance Adeyeye, OHA (June 8, 2006).

As stated previously, the purpose of the FOIA is to provide the public with access to existing documents, not to create new documents at the request of the public. Thus, we have no obligation to create the statement that Johnson requests. Further, we conclude that CN did not cause a delay in DOE's effort to comply with Johnson's request. Johnson contacted CN on March 28, and CN forwarded his letter to OHA approximately one week later. There was nothing about CN's actions that appeared improper or untimely.

III. Conclusion

After reviewing the record of this case, we find that CN, OHA and HS conducted searches that were reasonably calculated to uncover the requested information. Johnson has not provided any evidence that the items he requested exist. He has requested that DOE create new documents, a request that is outside the scope of the FOIA. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Freedom of Information Act Appeals filed by Samuel D. Johnson on March 7, 2006 and April 12, 2006, OHA Case Numbers TFA-0152 and TFA-0160, are hereby denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Office of Hearings and Appeals

Date: January 12, 2007